

NTSB Order No. EA-3845

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1993

Respondent .

Docket SE-8980

not appearing and, thus, was denied due process. He has requested the dismissal of all charges against him or, in the alternative, a new hearing. For reasons set forth below, we deny both requests.

The pertinent facts are as follows: The Administrator issued the suspension order on January 11, 1988, and respondent, through his attorney, filed an appeal on January 30, 1988. The demands of his job, respondent contends, often caused him to be away from home for weeks at a time; however his grandparents, with whom he lived, forwarded his mail to him weekly.

In January of 1989, respondent's grandparents were out of town on vacation. When they returned the following month, respondent's grandfather was hospitalized and subsequently died in March 1989. During this period, respondent's mail was not forwarded to him.

Meanwhile, the law judge issued a notice of hearing on February 2, 1989, scheduling the hearing of respondent's appeal for March 6, 1989.¹ Notice was mailed to both respondent and his attorney via certified mail. Receipt at the attorney's office was acknowledged by signature on February 8, 1989. After respondent's copy was returned unclaimed, the law judge's office sent a copy to respondent by regular mail.

¹Due to a severe winter storm on this date, the law judge postponed the hearing one day until March 7, 1989. The court clerk posted adequate notice of this change on the hearing room door. In any event, this is not an issue, as respondent and his attorney were not present on either day.

On the day of the hearing, the law judge and counsel for the Administrator were present but respondent and his attorney were not. The law judge stated on the record that respondent's attorney had contacted the law judge's office on March 3, 1989, stating that he was going to withdraw from the case and would forward a motion to that end, but the attorney never actually spoke to the law judge directly or obtained authorization for a withdrawal.² Consequently, the law judge dismissed respondent's appeal. Respondent later filed a "Motion to Reopen" the hearing, which the law judge denied.

We find no merit in respondent's assertion that he did not receive timely notice of the hearing date. Proper notification was mailed both to respondent at the address he supplied to the Board and to his legal counsel of record a month before the hearing date, over one year from the time respondent initially requested a hearing. Simply because respondent did not collect his mail or maintain contact with his attorney does not mean he was not properly notified.³ He and his attorney knew that his appeal was pending before the Board and therefore he had a responsibility to monitor the status of his own case and see to

²Under sections 821.6(d) and 821.7(a) of the Board's Rules of Practice, 49 C.F.R. Part 821, notice of a change in counsel of record must be given in writing to the Office of Administrative Law Judges. See Administrator v. Air National Sales and Service, Inc., 5 NTSB 653 (1985).

³See Administrator v. Hamilton, NTSB Order No. EA-2743 (1988) (service by certified mail, returned unclaimed, can be considered constructive service).

it that he attended or was represented at the hearing.⁴ He did not fulfill that duty.

In sum, respondent's failure to appear or be represented at the hearing was directly attributable to his failure to keep the Board or his own attorney apprised of the locations where he could be effectively and timely reached, not from any defect in notice or error by the law judge. His appeal will, therefore, be denied.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's dismissal of respondent's appeal is affirmed.⁵

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁴In Administrator v. Gryder, NTSB Order No. EA-2827 (1988), we denied a respondent's motion to file a late appeal. The respondent, who had been away from his residence for an extended period of time, did not know of, and thus did not appear at, his hearing. We found that by failing to inform the Board of his whereabouts or to make other arrangements for the receipt of his mail, he did not exercise "an appropriate degree of diligence in the prosecution of his appeal." Id. at 2.

⁵Inasmuch as the Administrator at the hearing introduced no evidence in support of his charges, the law judge could only dismiss respondent's appeal; he was not authorized to "approve" or affirm the sanction sought by the Administrator. See, e.g., Administrator v. Wells, NTSB Order No. EA-3742 (1992).